SUPREME COURT, U. S.

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# Supreme Court of the United States

OCTOBER TERM, 1965.

No. 229

LAWRENCE J. REYNOLDS, d/b/a LARRY & KATZ, and JOHN SCHWEGMANN, JR. and PAUL SCHWEGMANN,

Appellants,

versus

LOUISIANA BOARD OF ALCOHOLIC BEVERAGE CONTROL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA.

## JURISDICTIONAL STATEMENT.

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ON APPEAL FROM THE SUPREME COURT OF LOUISIANA.

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JURISDICTIONAL STATEMENT.

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Appellants appeal from the judgment of the Supreme Court of Louisiana, which became final on January 17, 1966, upholding the validity of Act 463 of 1962 of the Louisiana legislature (now designated as Louisiana Revised Statutes, Title 26, Section 80, Subsections D through H), against the contention that the statute is repugnant to the Constitution of the United States.

## OPINION BELOW.

The opinion of the Supreme Court of Louisiana is reported in 248 La. 639, 181 So.2d 377. The opinion of the Court of Appeal for the Fourth Circuit, State of Louisiana, is reported at 173 So.2d 57. The opinion of the Civil District Court for the Parish of Orleans, State of Louisiana, is not reported. The opinions of the Supreme Court of Louisiana (including the two dissenting opinions) and of the Court of Appeal for the Fourth Circuit are set out in full in Appendices B and C, respectively. The Judgments and Reasons for Judgment of the Civil District Court for the Parish of Orleans are set out in full in Appendix D.

## JURISDICTION.

The appellants brought this suit seeking a declaration that Act 463 of 1962 of the Louisiana Legislature is repugnant to the constitutions of the United States and of Louisiana. The judgment of the Supreme Court of Louisiana was rendered on December 13, 1965, but the finality of the judgment was suspended by the timely filing of an application for rehearing that was denied on January 17, 1966. Notices of appeal were filed on April 15, 1966, in the Supreme Court of Louisiana and in the Civil District Court for the Parish of Orleans, State of Louisiana, each of which courts is possessed of a portion of the record in these proceedings. Section 1257(2) of Title 28, United States Code, confers on this court jurisdiction to review by direct appeal the decision of the Supreme Court of

Louisiana. The following decisions sustain the jurisdiction of the Supreme Court to review on direct appeal the decision in this case: *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 86 S.Ct. 1254 (1966); *Shroeder v. City of New York*, 371 U.S. 208 (1962); *Winters v. People of State of New York*, 333 U.S. 507 (1948).

## QUESTIONS PRESENTED.

1. Whether Louisiana Act 463 of 1962, particularly that provision specifying that no wholesale liquor license shall be issued to or held by any person unless at all times through the license year he maintains sales of liquor to at least 20% of the retailers within his "immediate trade area", violates either the due process or the equal protection clause of the fourteenth amendment to the Constitution of the United States because enforcement of the statute would prevent any person not presently licensed to engage in the wholesale liquor business in Louisiana from ever engaging in that business.

2. Whether the provisions of Louisiana Act 463 of 1962 deprive the appellants of their right to engage in the wholesale liquor business by imposing licensing standards not rationally related to the exercise of the police power, and therefore violate the due process clause of the fourteenth amendment to the Constitution of the United States.

3. Whether the statutory standards for issuance and renewal of wholesale liquor permits imposed by Louisiana Act 463 of 1962 discriminate unreasonably

between the appellants and other Louisiana wholesalers of alcoholic beverages and therefore violate the equal protection clause of the fourteenth amendment to the Constitution of the United States.

## STATUTES INVOLVED.

Act 463 of 1962 of the Louisiana Legislature, now designated as Louisiana Revised Statutes Title 26, Section 80, Subsections D through H, reprinted in Appendix A, Part 1.

## STATEMENT.

### 1. The Appellants.

For a number of years preceding the calendar Year 1963, appellants Lawrence J. Reynolds d/b/a Larry & Katz ("Reynolds") and John Schwegmann, Jr. and Paul Schwegmann, ("the Schwegmanns") were licensed by the Louisiana Board of Alcoholic Beverage Control ("the Board") as wholesale liquor distributors. For the year 1962, Reynolds was the holder of Louisiana wholesale liquor permit No. W-137, issued to the premises bearing the municipal number 133 South Robertson Street, New Orleans, Louisiana. Reynolds had also held for a number of years, and continues to hold, a license for the operation of a *retail* liquor business at the premises bearing the municipal number 1601 Cleveland Avenue, New Orleans. The Schwegmanns held, for the year 1962, Louisiana wholesale liquor permit No. W-151, issued to the premises bearing the municipal number 5300 Gentilly Road, New Orleans. The Schweg-

manns own stock in an affiliated corporation that participates in operating seven supermarkets that have held and continue to hold retail liquor licenses issued in the name of Schwegmann Brothers Giant Super Markets. (Stipulation, Tr. 21-24.)[1]

At all times, the appellants have used their respective wholesale liquor licenses solely for the purpose of importing alcoholic beverages for transfer to and resale by their respective wholly-owned or affiliated retail stores, for resale to the consuming public. The stores operated by the appellants are among the largest-volume retail liquor outlets in the State of Louisiana. As a result of the appellants' operation under their respective wholesale licenses, the appellants have been able to import and sell certain alcoholic beverages under private labels without paying a tribute to other wholesalers, for which these wholesalers would render only an inconsequential service. The parties have stipulated that neither Reynolds nor the Schwegmanns have violated any legislation or Board regulation during the period when they held their respective licenses. (Stipulation, Tr. 28.)

**2. The Statute.**

The Louisiana Legislature, during its 1962 session, enacted a statute, designated as Act 463 of 1962 (set

[1] Louisiana R.S. 26:83 (set out in Appendix A, Part 2), enacted in 1948, prohibits simultaneous operation by one person as both a wholesaler and a retailer of alcoholic beverages. However the statute contains a so-called "grandfather clause", exempting from its application any person who held either a wholesale or a retail permit, or both, continuously from January 1, 1948 until July 28, 1948. Both appellants meet the exemption requirements of the grandfather clause.

out in Appendix A, Part 1), imposing certain requirements for issuance or renewal of wholesale liquor permits. Act 463 of 1962 (now Louisiana Revised Statutes, Title 26, Section 80, Subsections D through H) sets forth inventory and warehouse requirements prescribing the amount of warehouse space and the value and quantity of liquors that a wholesale dealer must maintain; equipment requirements, prescribing the ownership or maintenance of delivery equipment; brand representation requirements, demanding that each applicant maintain brand representation with at least one liquor manufacturer; and, most onerous, customer and distribution requirements, prescribing that each applicant, throughout the license year, maintain *"sales to at least twenty (20) per cent of the retailers in* [*his trade*] *area* with separate sales to retailers accounting for at least 50% of the gallonage handled by him." (Emphasis supplied.) The statute goes on to exempt from these requirements "persons engaged primarily in the sale, handling, distribution, and storage of alcoholic beverages which are ultimately delivered or transported beyond the borders of the state"—a euphemism for the wholesale licensees who serve Mississippi bootleggers. The Louisiana Board of Alcoholic Beverage Control is empowered to adopt regulations to enforce the statute. Though the Board has published no such regulations, it has construed the term "trade area", with reference to a particular wholesaler, to mean the parish (county) actually serviced by the wholesaler. (Stipulations, Tr. 27-28, 60.)

Act 463 of 1962 was introduced in the Louisiana Legislature as House Bill 409. The bill had been drafted during the course of a series of informal meetings between the chairman of the Louisiana Board of Alcoholic Beverage Control and various officers and representatives of the Wines & Spirits Foundation of Louisiana, Inc., a trade association of wholesale liquor dealers to which a large majority of Louisiana wholesale permittees, but neither of the Appellants, belong. Throughout the pedency of House Bill 409, the Wines & Spirits Foundation of Louisiana, Inc. lobbied vigorously for its passage. (Stipulations Tr. 25-26, 58-59.)

A conference committee of the Louisiana House and Senate recommended acceptance of an amended Senate version of House Bill 409. When the Senate amendment was debated, at least one Senator stated on the floor of the Senate that the proposed legislation was calculated to eliminate the Schwegmanns as wholesalers. When the Conference Report was presented to the House of Representatives, at least three representatives stated that the bill was vindictive legislation directed at John Schwegmann. (Stipulation, Tr. 27.)

**3. Proceedings Below.**

Both Reynolds and the Schwegmanns made timely applications to the Board for 1963 wholesale liquor licenses. Each application was in proper form and contained all required information, and each was accompanied by the statutory license fee of $2,000. By letters

dated November 21, 1962, the Board notified both Reynolds and the Schwegmanns that their 1963 wholesale liquor permits were being "withheld and denied". Of the fifty-six holders of 1962 wholesale liquor permits, only three, Reynolds, the Schwegmanns, and one Romeal Theriot, who has not been engaged in the wholesale liquor business since 1963, failed to qualify for 1963 licenses. The parties have stipulated that both Reynolds and the Schwegmanns possess all qualifications required for issuance of a Louisiana wholesale liquor license, except for some of the qualifications imposed by Act 463 of 1962. (Stipulation, Tr. 21-25.)

On December 3, 1962, Reynolds and the Schwegmanns each filed petitions in the Civil District Court for the Parish of Orleans, State of Louisiana, alleging that Act 463 of 1962 is repugnant to the due process and equal protection clauses of the United States Constitution, because it is "arbitrary, capricious, discriminatory, and unreasonable, and bears no conceivable relation to the alleged objectives sought to be attained by the Act, that is, the protection of the public health, morals, safety or welfare". The petitions also alleged various infirmities under the Louisiana Constitution, and prayed that the statute be decreed invalid and that a temporary restraining order and, in due course, preliminary and permanent injunctions issue restraining the Board from withholding the petitioners' respective 1963 wholesale permits, and from interfering in any way with the appellants' operations of their wholesale liquor busi-

nesses. The Civil District Court issued temporary restraining orders, which were continued in full force and effect by consent during the pendency of the suits in that court. By an order dated December 4, 1962, the two suits were consolidated. The consolidated suits were submitted entirely on stipulations. On December 13, 1964, the Civil District Court rendered judgments in favor of the Board, upholding the constitutionality of the statute and dismissing both suits. (The judgment of the Civil District Court in each case, and the Reasons for Judgment in the consolidated cases, are set out in full in Appendix D.)

March 8, 1965, the Court of Appeal for the Fourth Circuit, State of Louisiana reversed the judgments of the Civil District Court, and entered judgments holding Act 463 of 1962 unconstitutional under the due process clauses of the Fourteenth Amendment to the United States Constitution and of Article I, Section 2 of the Constitution of Louisiana, and permanently enjoining the Board from withholding the appellants' wholesale permits or enforcing the provisions of Act 463 of 1962. (The Court of Appeal's opinion in the consolidated cases is set out in full in Appendix C.) The Board's application for rehearing was denied.

May 5, 1965, the Supreme Court of Louisiana granted a writ of certiorari to review the judgment of the Court of Appeal in the consolidated cases. After a hearing in which the appellants reiterated arguments in support of all of the constitutional defects alleged in their original petition, the Supreme Court of Louisiana reversed the judgments of the Court of

Appeal and reinstated those of the trial court, holding Act 463 of 1962 valid under the constitutions of the United States and of Louisiana. In its opinion sustaining the validity of the statute, the Louisiana Supreme Court made the following statements:

> As stated supra, an overwhelming number of applicants have been able to qualify as wholesale liquor dealers; this fact substantiates the reasonableness of the provisions of LSA-R.S. 26:80(D). We conclude that the statute is a legitimate exercise of the State's police power; it violates neither the Due Process Clause of Art. I, Sec. 2, of the Constitution of Louisiana nor the Due Process provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States.
>
> Opinion of the Supreme Court of Louisiana, Tr. 215-16.

Two justices dissented, arguing variously that the statute is unconstitutional because it forecloses issuance of a wholesale permit to anyone not presently a licensee; discriminates unreasonably between wholesalers within Louisiana; and imposes "arbitrary and unnecessary requirements and onerous burdens . . . aimed at the plaintiffs in this case and no others among the many wholesale liquor dealers of the State". (Tr. 217-220.) (The opinion of the Supreme Court of Louisiana and both dissenting opinions are reproduced in full in Appendix B.) January 17, 1966, the Supreme Court of Louisiana refused

the Appellants' timely petition for rehearing. April 15, 1966, the Appellants filed notices of appeal to the Supreme Court of the United States in both the Civil District Court for the Parish of Orleans and the Supreme Court of Louisiana.

**4. Wholesale Distribution of Alcoholic Beverages in Louisiana.**

Five major distilleries produce about ninety per cent of the whiskeys distributed in Louisiana. These distilleries have granted in the past, and continue to grant, exclusive distributorships covering large areas of the State. In some instances, certain distilleries have had, or now have, an exclusive distributor in southern Louisiana and an exclusive distributor in northern Louisiana. (Stipulation, Tr. 28.) Although it is not difficult, as a general rule, for a reputable wholesaler to obtain brand representation from a distillery or manufacturer, the best known (and most profitable) brands are customarily reserved exclusively for certain named wholesalers. (Stipulation, Tr. 62.)

For the year 1962, the Board issued fifty-six wholesale permits, including those of Reynolds and the Schwegmanns. Of these, at least seven were permits for the distribution of wine only. In addition, as may partially be seen from the number of permittees having names similar to those of other permittees, many of the permits were issued to corporations, partnerships, or sole proprietorships belonging to persons owning, or owning stock in, more than one permittee.

(Exhibit, Tr. 30-32.) Therefore the number of liquor wholesalers operating in Louisiana is, in a sense, substantially smaller than the number of permittees.

At least seven of the wholesale permittees in Louisiana operate establishments known as "border houses". These establishments are located close to the Mississippi state line. Of these seven permittees at least three have, over the years, sold exclusively for export out of Louisiana. The rest have made more than 98% of their sales for export, with some isolated sales to Louisiana retailers. Substantially all sales by these "border-house" permittees have been made at their respective warehouses, directly to holders of U. S. Treasury wholesale liquor tax stamps who operate in the State of Mississippi. (Stipulation, Tr. 26.) None of these permittees complies with all provisions of Act 463 of 1962, in that none of these "exporters", so-called, maintains delivery equipment and none maintains sales of liquor to at least 20% of the dealers in his immediate trade area. However, the Board has regarded these permittees as within the exemption provision of Act 463 of 1962, and has continued to issue licenses to these establishments. (Stipulation, Tr. 27.)

Sales by the "border-house" permittees are classified by the Board as "export sales". In these "export sales", alcoholic beverages are put on a truck furnished by the purchaser, under an invoice form on which the purchaser reflects his ownership of a federal tax stamp and agrees to take the beverages out of Louisiana via a specific highway. The Lou-

isiana Revenue Department approves the invoice and collects an "export inspection fee" of thirty cents per case, the sole charge and tax made by the State of Louisiana on these beverages. The figures of the Louisiana Revenue Department for the year 1962 would reflect that as of that year about 370,000 cases of alcoholic beverages were sold annually for export, on which the Revenue Department received an inspection fee of thirty cents per case, and that about 1,400,000 cases were sold annually for consumption in Louisiana, on which the Revenue Department received a tax of $4.03 per case. (Stipulation, Tr. 26-27.)

The Louisiana Alcoholic Beverage Control Law requires that no wholesaler may sell, nor may any retailer buy, any alcoholic beverage except for cash or on terms requiring payment within fifteen days after delivery. Louisiana R.S. 26:159. The law requires each wholesaler to notify the Board immediately of any failure to receive punctual payment from any retailer. The Board maintains, and distributes among all manufacturers and wholesalers in the State, a list entitled "Delinquent List", containing the names of all retail permittees currently classified as delinquent under the terms of the Alcoholic Beverage Control Law, and a list entitled "Permanent Cash List", containing the names of all retailers to whom wholesalers may, under the statute, sell only for cash. As of May 28, 1963, the Board had issued about 1,475 retail liquor permits in Orleans Parish (the City of New Orleans), and about 490 retail liquor permits in the adjoining Parish of Jefferson. As of the same date, the "Delinquent List" contained

the names of about 270 retail permittees in Orleans Parish, and about 50 retail permittees in Jefferson Parish; and the "Permanent Cash List" contained the names of about 425 retail permittees in Orleans Parish and of about 100 retail permittees in Jefferson Parish. The number of permittees in these parishes, the number of permittees on the "Delinquent List", and the number of permittees on the "Permanent Cash List" remain relatively constant. (Stipulation, Tr. 25.)

## THE QUESTIONS ARE SUBSTANTIAL.

Throughout the United States the distribution and sale of alcoholic beverages, more than any other consumer commodity in general use, are subject to stringent and thorough state regulation. The law of every State prescribes rigid structures for traffic in alcoholic beverages at every distributive level. Any constitutional attack on a State law governing the liquor trade invariably provokes two counter-arguments: first, that the twenty-first amendment gives the States virtual carte blanche in restricting commerce in intoxicants; second, that because of the social evils traditionally associated with consumption of alcoholic beverages, the States may, in the exercise of their police power, adopt almost any regulatory measure, however ill-conceived, to protect the public from the dangers posed by a corrosive commodity.

The States do have wide latitude for regulation of intrastate liquor traffic within constitutional limits.

For obvious reasons, however, broad State participation in liquor regulation has motivated segments within the liquor industry to form powerful and highly organized trade associations that foster abusive and preferential legislation unrelated to the public welfare and in disregard of the rights of individuals. In its recent comprehensive study of the alcoholic beverage industry, the New York State Moreland Commission reached the following impartial conclusion:

> From the standpoint of a student of government, the conclusion is irresistible that the maintenance of major restrictive provisions of our liquor laws has been dictated by the industry, at the expense of public convenience, logic and good administration.
>
> Report of New York State Moreland Commission on the Alcoholic Beverage Control Law, Report No. 3, p. 25 (1964).

Wholesale distribution of alcoholic beverages is peculiarly vulnerable to discriminatory regulation. First, the lobbying urge is especially acute at the wholesale level, where an immensely profitable industry is in the hands of only a few operators. (This Court has recently acknowledged that "the structure of the liquor industry is such that even the largest national distillers deal through a relatively limited number of wholesalers." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 86 S.Ct. 1254, 1263 (1966). Louisiana is no exception. The record in this case reflects that even as of 1962 about 1,770,000 cases

of alcoholic beverages were sold annually in Louisiana by only fifty-three wholesale permittees, many of which had, and still have, identical or affiliated owners.) Moreover, the proposal and passage of abusive legislation affecting wholesale (as opposed to retail) distribution of any commodity arouses little public reaction, because its impact on the consumer, however adverse, is indirect.

The statute under attack in these proceedings is exemplary of the type of abuse of which liquor legislation is uniquely susceptible. The purpose and effect of this discriminatory statute is twofold: first, to impose onerous licensing requirements that preempt the wholesale market for present licensees by effectively precluding issuance of additional wholesale liquor licenses; and second, to eliminate the appellants as future competitors in the wholesale liquor market, and force them to import or purchase alcoholic beverages solely from other wholesale licensees.

Legislative motive may not determine statutory validity, but an awareness of the factors influencing passage of a statute is surely essential to a proper perspective on the statute and its effect. And the economic impact of legislation is relevant in ascertaining whether it violates equal protection or due process guarantees. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Mayflower Farms v. Ten Eyck*, 297 U.S. 266 (1936); *McFarland v. American Sugar Refining Co.*, 241 U.S. 79 (1916). Here, the record is replete with evidence that the wholesale liquor dealers' trade association

—the Wines and Spirits Foundation of Louisiana, Inc. —was instrumental in drafting and sponsoring preferential legislation. (Stipulations, Tr. 36-51, 58-59).[2]

Act 463 of 1962, fostered by the wholesale liquor dealers and their trade association, overrides constitutional precepts restricting regulation of any business: that no person may be excluded from an occupation or trade except for valid reasons; that the police power extends only to reasonable regulations designed to accomplish a proper legislative purpose; and that legislation may not discriminate irrationally between members of a class. This case presents to the Court an opportunity to enunciate constitutional guidelines delimiting the area within which state legislatures may operate in regulating an industry uniquely affecting the public welfare, but whose participants are nevertheless entitled to the benefit of traditional due process and equal protection guarantees.

**1. Constitutional Guarantees Apply to the Regulation of Commerce in Alcoholic Beverages.**

With alcoholic beverages as with other commodities, the power to regulate includes only the power to regulate reasonably. "The liquor business is like any other business in that the state is limited in its

[2] Act 463 of 1962 was drafted during the course of a series of informal meetings between the chairman of the Alcoholic Beverage Control Board and various officers and representatives of the Wines and Spirits Foundation (Tr. 58-59). The executive secretary of the Wines and Spirits Foundation exhorted membership support for the bill (Tr. 59), maintained close surveillance over the bill's progress (Tr. 36-51, 59); and referred to the statute as "our bill" (Tr. 51).

regulation of it by due process and equal protection requirements. . . ." *Hornsby v. Allen*, 330 F.2d 55 (5th Cir. 1964) (on rehearing). The Supreme Court of Louisiana has consistently recognized this constitutional principle. *City of Baton Rouge v. Rebowe*, 266 La. 186, 75 So.2d 239 (1954); *Schwegmann Brothers v. Louisiana Board of Alcoholic Beverage Control*, 216 La. 148, 43 So.2d 248 (1949); *State ex rel Galle v. New Orleans*, 113 La. 371, 36 So. 399 (1904). But the Louisiana Supreme Court refused to apply the principle in this case.

Throughout the course of this litigation, the Alcoholic Beverage Control Board has taken the position that the so-called "privilege doctrine" authorizes the imposition of *any* condition to the issuance of liquor licenses, without regard to the strict application of constitutional principles. The Board's argument derives from two premises: first, the absence of an inherent right to engage in the liquor business; and second, the absence of any vested contractual or property right in a liquor license. On the basis of these premises, the Board urges that the right to engage in the business of distributing alcoholic beverages must be characterized as a "privilege" that is wholly within the power of the State to grant or deny. But this characterization obscures the applicable constitutional principle—that the State may not attach unconstitutional conditions to the granting of any license, however it is characterized.

Examples of the States' lack of authority to attach unconstitutional conditions to the granting of a priv-

ilege are legion. In the classic article on privilege, the author points out that the fallacy of the privilege doctrine

> inheres in the proposition that the right of the government to execute (for example, for treason) includes the right to torture instead. A person without any right to claim his life from the government is still protected by constitutional guarantees against other deprivations.
>
> Powell, The Right to Work for The State, 16 Colum. L. Rev. 99, 110-111 (1916).

This Court has consistently recognized the validity of this constitutional principle:

> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. *If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.* (Emphasis supplied.)
>
> *Frost v. Railroad Commission, 271 U.S. 583, 594 (1926).*

*Accord, Schware v. Board of Bar Examiners of State of New Mexico*, 353 U.S. 232 (1957); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926).

**2. The Twenty Per-Cent Requirement.**

Act 463 of 1962 provides, among other things, that

> No wholesale permit shall be issued or held after issuance by any person unless at all times throughout the license year he . . .
>
> * * *
>
> (5) Maintains sales of liquor to retailers generally within his immediate trade area, making sales to at least (20) per cent of the retailers in said area. . . .

Literal application of this provision will foreclose the issuance of any further wholesale liquor licenses in Louisiana, because no new applicant can meet the statutory requirement. Pretermitting the problems that any new applicant would have in complying with the other provisions of Act 463—the problems of financing the acquisition of warehouse space, delivery vehicles and distribution contracts before issuance of a license—it is obvious that no applicant can *begin* business with over twenty per cent of the available customers in the local market.

The economic realities of the wholesale liquor industry in Louisiana underscore the impossibility of any new applicant's ever complying with the statutory requirements. The five major distilleries, which produce about 90% of the whiskeys distributed in Lou-

isiana, maintain exclusive area franchise distributorships of brands that have wide consumer acceptance. A person seeking entry into the wholesale liquor business cannot obtain any of the recognized brands. The best that a newcomer could expect would be unknown, unadvertised brands requiring substantial sales effort, over a prolonged period of time, for introduction into 20% of the existing retail establishments. Moreover, under the credit provisions of the Alcoholic Beverage Control Law a retailer is required to pay a wholesaler within fifteen days of purchase, and it is inconceivable that many retailers would commit capital in unknown brands. In the City of New Orleans, where there were about 1475 retailers in 1962, a new wholesaler seeking a license in that year would have faced the insuperable task of peddling his unknown brands to about 295 retailers. This requirement seems all the more onerous when one considers that almost 700 of the 1475 New Orleans retailers were on either the Board's "Permanent Cash List" or its "Delinquent List", and could buy only for cash, or, at best, were classified by the Board itself as bad credit risks.

These economic considerations, however, are academic. Under the terms of the statute, no new wholesaler could even reach these hurdles. Simple logic precludes new wholesalers if the statute is enforced, because (1) no one can get a wholesale license who does not maintain sales to at least 20% of the retailers in his trade area, and (2) no one can import alcoholic beverages or sell them to retailers unless he already has a wholesale license. Both dissenting Jus-

tices of the Louisiana Supreme Court recognized this defect on the face of the statute:

> This provision will bar the issuance of future wholesale permits, for no applicant has such a volume of customers upon beginning business. Therefore, the requirement restricts wholesale business to those presently engaged in it. Administrative regulations cannot remedy the vice, because a regulation contrary to the statute's express provisions will be invalid. See Charbonnet v. Board of Architectural Examiners, 205 La. 232, 17 So.2d 261.
>
> Dissenting Opinion of Justice Sanders, Tr. 217-18.

The literal application of the act, particularly the requirement that the holder thereof maintain sales to at least 20% of the retailers in his area, would foreclose the issuance of any further wholesale liquor licenses, because no applicant for a license can be selling to 20% of the retail trade when he applies. The net effect of this and the other requirements concerning warehouse space and delivery equipment is to virtually set aside the wholesale alcoholic beverage distribution business for those who presently hold licenses other than plaintiffs. Such a regulation is not in the public interest, but, rather, it is an attempt to give an economic advantage to those now engaged in this particular business as against all those

> who attempt to enter that business hereafter. The result will be to deprive the public generally of the beneficial effects of competition.
>
> Dissenting Opinion of Justice Summers, Tr. 219-20.

To preempt a trade or occupation for those engaged in it on some arbitrarily chosen date is a denial of due process to those desiring thereafter to enter the trade or occupation. This doctrine was expressly applied by this Court in *Mayflower Farms v. Ten Eyck*, 297 U.S. 266 (1936). There, in striking down a New York statute regulating the sale of milk the Court said:

> This is but another way of saying the legislature determined that during the life of the law no person or corporation might enter the business of a milk dealer in New York City.
>
> * * *
>
> The challenged provision . . . is not a regulation of a business or an activity in the interest of, or for the protection of the public, but an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date.
>
> *Mayflower Farms v. Ten Eyck, supra, at 273-74.*

The applicability of the *Mayflower Farms* language to the present case is obvious. Accord, *Morey v. Doud*, 354 U.S. 457 (1957) (citing with approval *Mayflower Farms v. Ten Eyck, supra).*

**3. The Statutory Standards Contravene Due Process.**

Act 463 of 1962 is patently invidious private legislation carefully tailored by the wholesale liquor dealers' trade association to exclude the appellants, and no other present licensees, from the wholesale liquor market. The statute has accomplished its objective admirably—besides the two appellants, only one other marginal wholesale permittee out of the total of fifty-six holders of 1962 permits was denied a 1963 license.[3]

Prior to 1963, the appellants had held wholesale liquor licenses for nearly twenty years. None of the evils traditionally associated with the consumption of alcoholic beverages has ever been charged to these appellants. Neither appellant was denied a license because his operation affected the public health, safety, morals, or general welfare. Neither was rejected because he was financially irresponsible; neither was rejected because his wholesale operation contributed to an unstable liquor market.

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[3] The Supreme Court of Louisiana, inexplicably, regarded this statistic as an indication of the statute's *fairness*. The majority opinion recites as follows:

> As stated supra, an overwhelming number of applicants have been able to qualify as wholesale liquor dealers; this fact substantiates the reasonableness of the provisions of LSA-R.S. 26:80(D). (Tr. 215-16.)

The constitutional authority to regulate liquor more stringently than other commodities derives from the necessity to meet specific evils incident to the sale and consumption of alcoholic beverages—sales to minors, alcoholism, drink solicitation by B-girls, criminal activities involving barrooms, theft of alcoholic beverages, state tax fraud, and other evils. If a liquor statute is not directed at these unique problems, the statute must meet due process standards applicable to all businesses.

The statutory provisions requiring maintenance of an inventory, warehouse space, delivery equipment, brand representation, and, most onerous of all, sales to twenty per cent of the local retailers, are arbitrary, capricious, and unreasonable. For example, what conceivable relation can a liquor wholesaler's maintenance of delivery equipment bear to the public welfare? This requirement merely places an unreasonable burden on any wholesaler who desires to sell only on a cash and carry basis. And how can it be said that a wholesaler's failure to maintain inventory or warehouse space creates instability in the liquor market? Inventory and warehouse space bear only the most tenuous relationship to *net* worth.

The requirement that a wholesaler sell to 20% of the local retailers is the statute's most objectionable feature. Imposition of this requirement would preclude a wholesaler from restricting his distribution to a limited geographical area or a specific type of retailer. If a wholesaler were to lose a popular brand,

and thereby lose 20% coverage, the statute would eliminate him from the wholesale market. Moreover, the 20% requirement empowers retailers, should they desire to boycott a particular wholesaler for political, racial, or other reasons, to prevent renewal of the wholesaler's license.

That the statutory requirements are arbitrary and unreasonable is patent. Act 463 of 1962 would hardly have been more specifically directed at these appellants if it had said that no person could carry on a wholesale liquor business at the appellants' respective addresses. The legislation penalizes the appellants because they chose to restrict their licensed activities to the servicing of their respective affiliated retail licensees. The purpose of the statute is to eliminate the appellants as wholesale liquor dealers, and force them to buy even liquors bearing their private labels (their own names) from other wholesale licensees.

In appraising the validity of Act 463 of 1962, the Court must look beyond the terms of the law and recognize its discriminatory effect. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Viewed realistically, the statute violates the elemental tenet that "a State cannot exclude a person from . . . any . . . occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 238-239 (1957). *Cf. Bolling v. Sharpe*, 347 U.S. 497 (1954). Justice Summers of the Louisiana Supreme

Court characterized the statute properly in his dissenting opinion in this case:

> The arbitrary and unnecessary requirements and onerous burdens of the act are aimed at the plaintiffs in this case and no others among the many wholesale liquor dealers of the state.
>
> * * *
>
> In an attempt to devise legislation which would discriminate solely against the plaintiffs in this case, the drafters of this act have imposed regulatory measures which bear no rational relation to the interest of the public at large. By reason thereof the police power of the State has been abused and misused, and the act is unconstitutional.
>
> Dissenting Opinion of Justice Summers, Tr. 219-20.

**4. The Statutory Provisions Violate Equal Protection Guarantees.**

The discriminatory standards imposed by Act 463 of 1962 are perhaps even more repugnant to the equal protection clause of the fourteenth amendment than to the due process clause. In the most recent case in which this Court applied equal protection guarantees in the sphere of economic regulation, the Court pointed out that regulatory distinctions between business entities engaged in the same business activity cannot be justified if the distinctions bear no relation to any genuinely different characteristics of the business entities involved. *Morey v. Doud*, 354 U.S.

465 (1957). "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37-38 (1928).

The discriminatory classification made by Act 463 appears on the face of the statute and is emphasized by the underlying economic facts. The most flagrantly discriminatory feature of the law, however, is that provision exempting from the statutory burdens the so-called "border houses", which make substantially all their sales for "export" to Mississippi bootleggers. The provision exempting border houses (many of which are affiliated with other permittees operating within the State) completes the statutory pattern of discrimination. The exemption bears no relation to any genuine distinction between the border houses and other permittees. However, without this provision, the statute would have failed to achieve its avowed purpose—elimination of the appellants—and *only* the appellants, among present licensees—from the wholesale liquor market. The exemption violates constitutional principles reiterated in many opinions of this Court.[4] *Morey v. Doud, supra; Louisville Gas*

[4] The dissenting opinion of Justice Sanders of the Louisiana Supreme Court points out another constitutional defect in the statutory provision exempting "border houses":

> Proponents of the statute suggest this provision exempts "border houses" that primarily "export" alcoholic beverages to other states. But as phrased, the exemption is not limited to exporters, properly speaking. It also applies to sales within the state in domestic transactions, when the liquor is *ultimately* and for any purpose transported across the state line. The exemption therefore depends on the fortuitous travels of the commodities sold. I think the exemption unconstitutionally discriminates between wholesalers in the state.
>
> Dissenting Opinion of Justice Sanders, Tr. 218.

*& Electric Co. v. Coleman, supra; McFarland v. American Sugar Refining Co.*, 241 U.S. 79 (1916); *Cotting v. Godard*, 183 U.S. 79 (1901).

## CONCLUSION.

It is respectfully submitted that Act 463 of 1962 of the Louisiana legislature is invalid and unconstitutional in that it imposes arbitrary, capricious, and unreasonable standards for the licensing of wholesalers of alcoholic beverages in Louisiana, and that the statute represents a blatant attempt to preempt forever the wholesale liquor market in Louisiana for those licensees, other than the appellants, presently engaged in the wholesale liquor business. It is further submitted that the questions submitted by this appeal are substantial and that they are of public importance.

Respectfully submitted,

.....
SAUL STONE

.....
PAUL O. H. PIGMAN

.....
DAVID STONE
of
STONE, PIGMAN & BENJAMIN
1200 Whitney Bank Building
New Orleans, Louisiana
Attorneys for Appellants

**PROOF OF SERVICE.**

I, Saul Stone, attorney for Lawrence J. Reynolds, d/b/a Larry & Katz and for John Schwegmann, Jr. and Paul Schwegmann, appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of June, 1966, I served copies of the foregoing, Jurisdictional Statement on the Louisiana Board of Alcoholic Beverage Control, Appellee, by depositing the same in a United States mail box, with first class postage prepaid, addressed to the appellee's counsel of record, Clem H. Sehrt of Sehrt, Boyle & Wheeler, National American Bank Building, New Orleans, Louisiana, and George A. Bourgeois, Attorney, in care of the Louisiana Board of Alcoholic Beverage Control, P.O. Box 2708, Baton Rouge, Louisiana.

.....

SAUL STONE

New Orleans, Louisiana
June ....., 1966

## APPENDIX A.

### (1) Pertinent Sections of Act 463 of 1962.

Section 1. Sub-section (9) of Section 2 of Title 26 of the Louisiana Revised Statutes of 1950, is hereby amended and re-enacted to read as follows:

**Definitions**

For purposes of this Chapter, the following terms have the respective meanings ascribed to them in this Section, unless a different meaning clearly appears from the context:

(9) "Liquor wholesaler" means any dealer who sells any alcoholic beverage to other licensed liquor wholesale dealers or to licensed retail liquor dealers in the state or who sells alcoholic beverages for delivery beyond the borders of the state in amounts to be fixed by the board, or who imports any alcoholic beverages into the state, and who meets the standards set forth in this Chapter.

* * *

Section 6. To amend and re-enact Subsection B and to add and enact Sub-section D of Section 80 of Title 26 of the Louisiana Revised Statutes of 1950, to read as follows:

**80. Location of business limited**

B. No permit shall be issued by the board or by any municipality or parish to authorize any

business in any subdivision of the state where the business has been prohibited by referendum vote.

However, in any subdivision where saloons are prohibited, but package sales of liquor are permitted, Class B. package liquor permits may be issued in combination with Class A retail beer permits.

D. No wholesale permit shall be issued or held after issuance by any person unless at all times throughout the license year he meets the standards set forth as follows:

(1) Maintains warehouse space either owned or leased by the wholesaler, or dedicated to his use in a public warehouse and such space shall be sufficient to store at one time either:

(a) A stock of liquor equal to *ten per cent or more of the wholesaler's annual case volume of liquor sales to retailers within this state,* or

(2) *Maintains at all times in the warehouse a stock of liquor owned by him,* not consigned, nor then sold, consisting of not less than five (5%) per cent of his annual sales to retailers, and *whose cost of acquisition is fifty thousand dollars or more;*

(3) *Maintains delivery equipment* which shall be leased, owned or dedicated to his use;

(4) *Maintains brand representation* with at at least one distillery, or liquor manufacturer;

(5) *Maintains sales of liquor to retailers generally within his immediate trade area, making sales to at least twenty (20) per cent of the retailers in said area* with separate sales to retailers accounting for at least 50% of the gallonage handled by him.

No wholesale permit shall be issued or held at issuance by any person who does not in good faith actually carry on or intend to carry on a bona fide wholesale business by sale to retail permittees of the alcoholic beverages on hand, and the board may revoke any wholesale permit when the permittee fails for a period of 45 days actively and in good faith to engage in the wholesale business, and shall revoke any wholesale permit for any other violation of this Sub-section or the rules and regulations adopted pursuant to the enforcement hereof.

Sale by a wholesaler to himself as a retailer, or as a partner in a retail establishment is not a bona fide wholesale transaction. No wholesaler shall store any of his stock on the premises of any retail establishment.

*Persons engaged primarily in the sale, handling, distribution, and storage of alcoholic beverages which are ultimately delivered or trans-*

*ported beyond the borders of the state are exempt from complying with the standards above set forth.*

The board may adopt and publish rules and regulations for the enforcement of this section. (Emphasis supplied.)

**(2) Louisiana Revised Statutes Title 26, Section 83:**

**§ 83. Combination of wholesale and retail business prohibited; exceptions**

Except as provided in paragraphs (1) and (2) of this Section, no person shall, at the same time, engage in business, either directly or indirectly, as a wholesaler and as a retailer of any regulated beverage and no wholesaler shall have any interest, direct or indirect, at any time in the business or permit of a retailer. However:

(1) Any person who, from January 1, 1940, until July 28, 1948, was continuously a duly licensed manufacturer in the state of any established brand of alcoholic beverage and sold alcoholic beverages at wholesale and retail, may, subject to the other requirements of this Chapter, be issued permits as a manufacturer and as a wholesaler and as a retailer of alcoholic beverages.

(2) *Any person who, from January 1, 1947, until July 28, 1948, was the holder of a wholesale or retail permit, or of both, may, subject to the other requirements of this Chapter, procure permits under this Chapter either as a wholesaler or as a retailer, or as both.* (Emphasis Supplied.)

## APPENDIX B.

**248 La. 639**

**LAWRENCE J. REYNOLDS, d/b/a Larry & Katz and John Schwegmann, Jr., and Paul Schwegmann**

**v.**

**LOUISIANA BOARD OF ALCOHOLIC BEVERAGE CONTROL.**

**No. 47762.**

Supreme Court of Louisiana.
Dec. 13, 1965.
Dissenting Opinion Dec. 21, 1965.
Rehearing Denied Jan. 17, 1966.

HAMLIN, Justice:

We granted Certiorari (Art. VII, Sec. 11, La.Const. of 1921) in these consolidated cases in order that we might review a judgment of the Court of Appeal (La. App., 173 So.2d 57), which decreed Subsection D of Section 80 of Title 26 of the Louisiana Revised Statutes, as enacted by Section 6, of Act 463 of 1962, unconstitutional, null, and void; ordered, adjudged, and decreed that there be judgment in favor of plaintiff, Lawrence J. Reynolds, d/b/a Larry & Katz, and against the defendant, Louisiana Board of Alcoholic Beverage Control (hereinafter designated as the Board), permanently enjoining and prohibiting it, its

officers, agents, and employees from enforcing the provisions of LSA-R.S. Title 26, Section 80, Subsection D, and from withholding from said plaintiff a wholesale liquor permit on account of any provision of said Subsection D; and ordered, adjudged, and decreed that there be judgment in favor of John Schwegmann, Jr., and Paul Schwegmann against the defendant Board, permanently enjoining and prohibiting it, its officers, agents, and employees from enforcing the provisions of LSA-R.S. Title 26, Section 80, Subsection D, and from withholding from said plaintiffs a wholesale liquor permit on account of any provision of said Subsection D. The judgment of the Court of Appeal reversed two separate judgments of the trial court (the matters were consolidated for trial in the trial court, but separate judgments were rendered) which were rendered in favor of the Board; the trial court also dismissed plaintiffs' suits at their costs.

Lawrence J. Reynolds, d/b/a Larry & Katz, and John Schwegmann, Jr., and Paul Schwegmann instituted these proceedings on December 3, 1962. They alleged that under the provisions of LSA-R.S. 26:80 (D), Act 463 of 1962, the Board had denied them wholesale liquor permits;[1] they prayed that LSA-R.S. 26:80

[1] The following letter was addressed to Lawrence Joseph Reynolds on November 21, 1962:

"Dear Sir:

"Your application for a 1963 Wholesale Liquor Permit is being withheld and denied by the Louisiana Board of Alcoholic Beverage Control for the reason that you cannot qualify under R.S. 26:80(D) in that your operation does not maintain sales of liquor to retailers generally within your immediate trade area; in that your operation does not make sales of liquor to at least twenty (20%) percent of the retailers in your area; and in that your operation does not have

(D) be declared unconstitutional and that they be granted injunctive relief.

Section 1 of Act 463 of 1962 amended and re-enacted Subsection (9) of Section 2 of Title 26 of the Louisiana Revised Statutes of 1950 to define a "Liquor Wholesaler" as follows:

> (9) 'Liquor wholesaler' means any dealer who sells any alcoholic beverage to other licensed liquor wholesale dealers or to licensed retail liquor dealers in the state or who sells alcoholic beverages for delivery beyond the borders of the state in amounts to be fixed by the board, or who imports any alcoholic beverages into the state, and who meets the standards set forth in this Chapter."

Section 6 of Act 463 of 1962 added and enacted Subsection D of Section 80 of Title 26 of the Louisiana Revised Statutes of 1950; it recites:

> "D. No wholesale permit shall be issued or held after issuance by any person unless at all times throughout the license year he meets the standards set forth as follows:
>
> "(1) Maintains warehouse space either owned or leased by the wholesaler, or dedicated to his

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separate sales of liquor to retailers accounting for at least fifty (50%) per cent of the gallonage handled by you."
An identical letter was addressed to John Schwegmann, Jr. and Paul Schwegmann on November 21, 1962; it contained the following clause in conclusion, "and, finally, in that you store wholesale liquor stock on the premises of a retail establishment."

use in a public warehouse and such space shall be sufficient to store at one time either:

"(a) A stock of liquor equal to ten per cent or more of the wholesaler's annual case volume of liquor sales to retailers within this state, or

"(2) Maintains at all times in the warehouse a stock of liquor owned by him, not consigned, nor then sold, consisting of not less than five (5) per cent of his annual sales to retailers, and whose cost of acquisition is fifty thousand dollars or more;

"(3) Maintains delivery equipment which shall be leased, owned or dedicated to his use;

"(4) Maintains brand representation with at least one distillery, or liquor manufacturer;

"(5) Maintains sales of liquor to retailers generally within his immediate trade area, making sales to at least twenty (20) per cent of the retailers in said area with separate sales to retailers accounting for at least 50% of the gallonage handled by him."

The Court of Appeal correctly recognized that the sale of alcoholic beverages in Louisiana is a lawful calling. It also correctly recognized that under the police power of the State, Art. XIX, Sec. 18, La.Const. of 1921, such business may be regulated, (State v. Nejin, 140 La. 793, 74 So. 103; City of Bogalusa v.

Gullotta, 181 La. 159, 159 So. 309; Ziffrin Inc. v. Reeves, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128), and that such regulations must be pursuant to a legitimate exercise of the State's police power, which includes the respecting of constitutional guarantees (Schwegmann Bros. v. Louisiana Board of Alcoholic Beverage Control, 216 La. 148, 43 So.2d 248, 14 A.L.R. 2d 680). The Court further correctly observed that there must be a real and substantial relationship between the regulations imposed and the prevention of injury to the moral, social, or economic welfare of the public, but concluded that such a relationship does not exist in the instant case between the statute involved and the purpose for which it was enacted. Because of its conclusion, the Court of Appeal found LSA-R.S. 26:80(D) unconstitutional.[2]

In this Court the Board contends that the Court of Appeal erred in holding that LSA-R.S. 26:80(D) has no reasonable relationship to the moral, social, or economic welfare of the citizens of the State of Louisiana. Alternatively, the Board argues that the Court of Appeal erred in declaring the entirety of LSA-R.S. 26:80(D) unconstitutional.

[2] The Court of Appeal stated, "We fail to find in the so-called standards set forth in Subsection D any legitimate relationship to the declared purpose of the Alcoholic Beverage Control Law (LSA-R.S. Title 26). We do not feel that the object of the law would be accomplished or that the interest of the public would be served in any way by it. In the absence of some protection of the moral, social, or economic welfare of the public to justify Subsection D, it must be held in violation of the 'due process of law' provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States and Article I, Section 2 of the Constitution of Louisiana."

Plaintiffs, respondents, contend that the instant statute is invalid and unconstitutional because of its invidious legislative discrimination imposing substantial and onerous burdens on the business activities of respondents in the wholesale distribution of alcoholic beverages. Respondents further contend that the instant statute is invalid "on the ground that the statute bears no substantial relationship to the public health and welfare, on the ground that the means adopted are not necessary for the accomplishment of any proper legislative purpose, and on the ground that the statute preempts the wholesale liquor business for present licensees—in violation of due process guarantees."

The stipulated facts of record set forth that:

"13—The use by the plaintiffs of their wholesale licenses for a number of years prior to the effective date of Act 463 of 1962, the use by the plaintiffs of their 1962 wholesale licenses from the effective date of the Act through December 3, 1962, when these proceedings were instituted, and the continuation by the plaintiffs of their wholesale activities under protection of the Temporary Restraining Order issued by the court in these proceedings, have been restricted to importation of alcoholic beverages for sale and transfer to the respective retail licensees described in Paragraph 1—C and 2—C of this stipulation. [1—C states that "Reynolds, d/b/a Larry and Katz, has been the holder of retail liquor licenses for a

number of years, * * *"; 2—C states that "The Schwegmanns own stock in a corporation which operates six super markets which have held and continue to hold retail liquor licenses issued in the name of Schwegmann Brothers Giant Super Markets, * *"] * * *The effect of the importation of these alcoholic beverages by the plaintiffs under their respective wholesale licenses and under the Temporary Restraining Orders has been to avoid a requirement by the associated retail permittees described in Paragraphs 1—C and 2—C to deal with and compensate wholesale permittees other than the plaintiffs in connection with the importation of these alcoholic beverages."

Our interpretation of the above stipulation is to the effect that as wholesalers, plaintiffs sell only to themselves as retailers. In other words, their wholesale liquor business is restricted to distribution and sale of liquor to retail businesses owned and controlled by them.

The stipulation of facts further sets forth that only three wholesale permittees (plaintiffs and one other company not now engaged in the wholesale liquor business) did not qualify for the issuance of a 1963 wholesale liquor license; fifty-three out of fifty-six previously licensed wholesale dealers were able to comply with all provisions of Subsection D of Section 80.

The stipulation further states that to obtain brand representation from a distillery or manufacturer is relatively a simple thing, and that at any time, any reputable wholesale dealer, without too much effort, can obtain representation of one or more brands from a distillery or manufacturer, though the best known brands are customarily exclusive with certain named wholesalers.

The test of whether the instant statute is a valid exercise of the police power in the constitutional sense depends on whether under all of the existing circumstances the regulation is reasonable, and whether it is really designed to accomplish a purpose properly falling within the scope of the police power. City of Baton Rouge v. Rebowe, 226 La. 186, 75 So.2d 239. "We have no right to review the policy of wisdom of legislation because our jurisdiction is confined to determining the applicability, legality or constitutionality of laws. Lionel's Cigar Store v. McFarland, 162 La. 956, 967, 111 So. 341." Mouledoux v. Maestri, 197 L. 525, 2 So.2d 11. See, Nebbia v. People of State of New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940.

These consolidated cases were tried in the district court on stipulations of facts. We find no contradiction in the stipulations nor in the record to the following statement set forth in the Board's brief filed in this Court:

> "The State Legislature, in enacting the subject statute, sought to establish within the state

liquor business, a class of true wholesalers. Subsection D of this statute, in effect, legislatively defines the functions of a wholesaler, and limits wholesale liquor permits to those parties who discharge those functions. The Legislature is merely requiring, that for a person to obtain a wholesale liquor license, he must be in the wholesale liquor business, i. e., he must serve the various liquor outlets in his area. And he must have the facilities to service these retailers, i. e., an adequate inventory and delivery equipment with which to distribute it. And as a practical matter, no party could participate in the wholesale liquor business unless he maintained brand representation with at least one distillery.

* * * * *

"* * * by establishing a class of true wholesalers, those parties who are economically unable to discharge the duties of dispensing alcoholic beverages at the wholesale level are eliminated from this phase of the liquor traffic. Only those parties who are economically able to have an adequate inventory, a place in which to store it, and delivery equipment with which to distribute it would be able to engage in the wholesale liquor business. The economic stability of the liquor traffic is of paramount importance. Subsection D of the subject legislation will necessarily aid in the achievement of this stabilization."

The stipulated facts reflect that the Board has issued approximately 1,475 retail liquor permits in the City of New Orleans and approximately 490 retail liquor permits in the Parish of Jefferson, which adjoins the Parish of Orleans. The stipulated facts also recite that "The annual figures of the Louisiana Revenue Department would reflect that approximately 370,000 cases of alcoholic beverages are sold for export, on which the Revenue Department receives an inspection fee of 30c per case. The annual figures of the Louisiana Revenue Department would reflect that approximately 1,400,000 cases of alcoholic beverages are sold for consumption in Louisiana, on which the Revenue Department receives a tax of $4.03 per case."

It is evident that the liquor business in Louisiana is operated on a large scale; it is also evident that the liquor business is voluminous and is one of rapid turnover.

We are constrained to deduce from the allegations of the Board's brief and the above facts that the Legislature desired to stabilize the *wholesale liquor business* and create within the liquor trade *a true class of wholesalers* who are economically stable and financially responsible. To accomplish this purpose the Legislature enacted the instant statute (the facts stipulated state that the proposed legislation contained in House Bill 409, as amended in the Louisiana Senate, was approved by a Conference Committee of the Louisiana House and Senate recom-

mending acceptance of the Senate version of the Bill), which sets forth certain standards for those engaged in *wholesale liquor traffic*.

We thus approach a determination of whether the provisions of LSA-R.S. 26:80(D) have a just foundation in reason (State ex rel. Galle v. City of New Orleans, 113 La. 371, 36 So. 999, 67 L.R.A. 70), whether they are arbitrary or discriminatory, and whether they affect the moral, social, or economic welfare of the public.

The instant statute applies equally to all persons who come within the common class of wholesale liquor dealers (this finding was also made by the Court of Appeal). It requires that wholesalers maintain warehouse space. It requires that such space be sufficient to store certain specified quantities of liquor. It requires that a certain stock of liquor be maintained. It requires that delivery equipment be maintained. It requires that brand representation be maintained with at least one distillery or liquor manufacturer (supra, we said that the facts stipulated set forth that this was not difficult). Finally, it requires that a certain amount of the wholesaler's sales be made to retailers, and that such sales account for a certain percentage of the gallonage handled by the wholesaler (supra, we set forth the percentages and amounts required by the statute).

It is hardly necessary to state that an economically stable and financially responsible wholesale liquor

business (as stated supra in the Board's explanation of the purpose of the instant statute) affects the social, moral, and economic welfare of the public. The provisions of the instant statute if enforced will undoubtedly engender stability and responsibility. Therefore, a definite relationship exists between LSA-R.S. 26:80(D) and the purpose for which it was enacted.

In considering the constitutionality of LSA-R.S. 26:80(D), it is not the prerogative of this Court to search for the legislative motive, State v. Goldfinch, 241 La. 958, 132 So.2d 860; no showing has been made as to why the Legislature adopted certain specified amounts and percentages, but no showing has been made to the effect that they are arbitrary, discriminatory, or prejudicial. We do not find them unreasonable, and no showing has been made to that effect. As stated supra, an overwhelming number of applicants have been able to qualify as wholesale liquor dealers; this fact substantiates the reasonableness of the provisions of LSA-R.S. 26:80(D). We conclude that the statute is a legitimate exercise of the State's police power; it violates neither the Due Process Clause of Art. I, Sec. 2, of the Constitution of Louisiana nor the Due Process provision of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The burden herein rested upon the plaintiffs to show the unconstitutionality of LSA-R.S. 26:80(D). In their original petitions, they set forth many rea-

sons for their allegations of unconstitutionality; we do not find that they have proved such allegations. It is a familiar principle of constitutional law that one who attacks the constitutionality of a statute has the burden of showing by clear and cogent evidence that the statute is unconstitutional. Kansas City Southern Railway Company v. Reily, 242 La. 235, 135 So.2d 915; Interstate Oil Pipe Line Co. v. Guilbeau, 217 La. 160, 46 So.2d 113; 16 C.J.S. Constitutional Law, § 99, p. 388.[3]

For the reasons assigned, the judgment of the Court of Appeal, Fourth Circuit, is reversed and set aside; the judgments of the trial court in these consolidated cases of Lawrence J. Reynolds, d/b/a Larry & Katz, vs. Louisiana Board of Alcoholic Beverage Control, and John Schwegmann, Jr. and Paul Schwegmann vs. Louisiana Board of Alcoholic Beverage Control are affirmed. All costs to be paid by plaintiffs.

HAMITER, J., concurs in the result.

[3] In Duke Molner Wholesale Liquor Co. v. Martin, 180 Cal.App.2d 873, 4 Cal.Rptr. 904, Certiorari denied 364 U.S. 870, 81 S.Ct. 112, 5 L.Ed.2d 92, a regulation similar to the instant statute was declared valid. The District Court of Appeal, Second District, Div. 1, California, stated:

"The appellants have failed to establish that the rule is invalid. An administrative rule which is legislative in character is subject to the same test with reference to its validity as is an act of the Legislature. * * * The presumption is that the rule under the circumstances set forth in this instance is reasonable and proper. * * *

"The Department is well within its rights to require a high standard of economic stability for those who are to hold wholesalers licenses. Schaub's, Inc. v. Department of Alcoholic Beverage Control, supra, 153 Cal.App.2d 858, 315 P. 2d 459."

SANDERS and SUMMERS, JJ., dissent and will assign written reasons.

SANDERS, Justice (dissenting).

The statute is unreasonable and discriminatory. I agree with the Court of Appeal's decision that it is unconstitutional. See 173 So.2d 57.

For instance, the statute prohibits issuance of a wholesale permit to any person or the holding of a permit by any person, unless "at all times throughout the license year" he maintains sales to twenty percent of the retailers in his trade area. LSA-R.S. 26:80D(5).[1] This provision will bar the issuance of future wholesale permits, for no applicant has such a volume of customers upon beginning business. Therefore, the requirement restricts wholesale business to those presently engaged in it. Administrative regulations cannot remedy the vice, because a regulation contrary to the statute's express provisions will be invalid. See Charbonnet v. Board of Architectural Examiners, 205 La. 232, 17 So.2d 261.

Exempted from the statute are: "Persons engaged primarily in the sale, handling, distribution,

[1] The California regulation upheld in Duke Molner Wholesale Liquor Co. v. Martin, 180 Cal.App.2d 873, 4 Cal.Reptr. 904, Certiorari denied 364 U.S. 870, 81 S.Ct. 112, 5 L.Ed.2d 92, contains no such requirement. It provides only that no license shall be "held" by any person who does not sell to "retailers generally rather than a selected few retailers." The statute then sets forth two instances in which it is "conclusively presumed" that a wholesaler is selling to retailers generally based upon percentage of retail customers and volume of small sales.

and storage of alcoholic beverages which are *ultimately* delivered or transported beyond the borders of the state * * *" (Italics mine).

Proponents of the statute suggest this provision exempts "border houses" that primarily "export" alcoholic beverages to other states. But as phrased, the exemption is not limited to exporters, properly speaking. It also applies to sales within the state in domestic transactions, when the liquor is *ultimately* and for any purpose transported across the state line. The exemption therefore depends upon the fortuitous travels of the commodities sold. I think the exemption unconstitutionally discriminates between wholesalers in the state.

For the reasons assigned, I respectfully dissent.

SUMMERS, Justice (dissenting).

In my view the provisions of the legislative act in contest (R.S. 26:80(D)) are unreasonable, arbitrary and discriminatory. The enactment bears no real and substantial relation to the public health, safety, morals or any other phase of the general welfare. The act is, therefore, unconstitutional, and it is this court's province and duty to decree its invalidity. City of Lafayette v. Justus, 245 La. 867, 161 So.2d 747 (1964).

The arbitrary and unnecessary requirements and onerous burdens of the act are aimed at the plaintiffs in this case and no others among the many wholesale liquor dealers of the State. Literal applica-

tion of the act, particularly the requirement that the holder thereof maintain sales to at least 20% of the retailers in his area, would foreclose the issuance of any further wholesale liquor licenses, because no applicant for a license can be selling to 20% of the retail trade when he applies. The net effect of this and the other requirements concerning warehouse space and delivery equipment is to virtually set aside the wholesale alcoholic beverage distribution business for those who presently hold licenses other than plaintiffs. Such a regulation is not in the public interest, but, rather, it is an attempt to give an economic advantage to those now engaged in this particular business as against all those who attempt to enter that business hereafter. The result will be to deprive the public generally of the beneficial effects of competition. Mayflower Farms v. Ten Eyck, 297 U.S. 266, 56 S.Ct. 457, 80 L.Ed. 675 (1936).

Hence, a proper legislative purpose for which the police power of the State can be invoked does not exist here. To the contrary, police power has been utilized to accomplish an unwholesome objective by means of discriminatory and arbitrary regulations.

In an attempt to devise legislation which would discriminate solely against the plaintiffs in this case, the drafters of this act have imposed regulatory measures which bear no rational relation to the interest of the public at large. By reason thereof the police power of the State has been abused and misused, and the act is unconstitutional.

I respectfully dissent.

## APPENDIX C.

**LAWRENCE J. REYNOLDS, d/b/a Larry & Katz,**

**v.**

**LOUISIANA BOARD OF ALCOHOLIC BEVERAGE CONTROL.**

**JOHN SCHWEGMANN, JR. and PAUL SCHWEGMANN**

**v.**

**LOUISIANA BOARD OF ALCOHOLIC BEVERAGE CONTROL.**

**Nos. 1717, 1718.**

Court of Appeal of Louisiana.

Fourth Circuit.

March 8, 1965.

Rehearing Denied April 5, 1965.

Before CHASEZ, HALL and BARNETTE, JJ.

CHRIS T. BARNETTE, Judge pro tem.

These cases present identical questions and were consolidated for the purpose of trial and have been consolidated in this Court for the purpose of briefing and argument. One opinion will suffice and will apply equally in both cases.

Appellants are wholesale liquor distributors in the City of New Orleans holding Louisiana wholesale liquor permits for a number of years including 1962. Appellant Reynolds, doing business under the name of Larry and Katz, also holds a retail liquor license and operates a retail liquor store at an address other than that for which his wholesale permits were issued. He makes no sales to retail stores other than that owned and operated by himself. Appellants Schwegmann own stock in a corporation which operates six supermarkets for retail sales of groceries, meats, produce, and numerous other items including alcoholic beverages. In connection with these sales Schwegmann Brothers Giant Super Markets holds retail liquor licenses for its several retail stores. The wholesale liquor business conducted by these appellants is restricted to distribution and sales of liquor exclusively through the affiliated retail stores owned and controlled by them.

The defendant-appellee, Louisiana Board of Alcoholic Beverage Control, refused to issue 1963 Wholesale Liquor Permits to appellants for the alleged failure of appellants to meet certain requirements set forth in LSA-R.S. Title 26, known as "The Alcoholic Beverage Control Law," as amended by Act 463 of 1962, and especially Section 80, Subsection D, in the following particulars as set forth in a registered letter of November 21, 1962, addressed to each appellant, stating as follows:

> "Your application for a 1963 Wholesale Liquor Permit is being withheld and denied by the Loui-

siana Board of Alcoholic Beverage Control for the reason that you cannot qualify under R.S. 26:80(D) in that your operation does not maintain sales of liquor to retailers generally within your immediate trade area; in that your operation does not make sales of liquor to at least twenty (20%) per cent of the retailers in your area; and in that your operation does not have separate sales of liquor to retailers accounting for at least fifty (50%) per cent of the gallonage handled by you."

The letters to each applicant were identical except that the letter to the Schwegmanns contained the additional statement:

"* * * and, finally, in that you store wholesale liquor stock on the premises of a retail establishment."

By stipulation of facts filed in the record, it is agreed that appellants have not violated any legislation or Board regulation at any time prior to the effective date of the act in question and that they meet all the requirements for issuance of a wholesale permit except some of those added by Subsection D of Section 80 of LSA-R.S. Title 26; these provisions having been added by Act 463 of 1962. It is for these reasons, and only these reasons, as the foregoing letter indicated, that their permits have been withheld and denied.

Section 80, Subsection D of LSA-R.S. Title 26 was added by Act 463 of 1962 and provides as follows:

"D. No wholesale permit shall be issued or held after issuance by any person unless at all times throughout the license year he meets the standards set forth as follows:

"(1) Maintains warehouse space either owned or leased by the wholesaler, or dedicated to his use in a public warehouse and such space shall be sufficient to store at one time either:

"(a) A stock of liquor equal to ten per cent or more of the wholesaler's annual case volume of liquor sales to retailers within this state, or

"(2) Maintains at all times in the warehouse a stock of liquor owned by him, not consigned, nor then sold, consisting of not less than 5% of his annual sales to retailers, and whose cost of acquisition is fifty thousand dollars or more;

"(3) Maintains delivery equipment which shall be leased, owned or dedicated to his use;

"(4) Maintains brand representation with at least one distillery, or liquor manufacturer;

"(5) Maintains sales of liquor to retailers generally within his immediate trade area, making sales to at least 20% of the retailers in said area with separate sales to retailers accounting for at least 50% of the gallonage handled by him.

"E. No wholesale permit shall be issued or held after issuance by any person who does not

in good faith actually carry on or intend to carry on a bona fide wholesale business by sale to retail permittees of the alcoholic beverages on hand, and the board may revoke any wholesale permit when the permittee fails for a period of 45 days actively and in good faith to engage in the wholesale business, and shall revoke any wholesale permit for any other violation of this Sub-section or the rules and regulations adopted pursuant to the enforcement hereof.[1]

"F. Sale by a wholesaler to himself as a retailer, or as a partner in a retail establishment is not a bona fide wholesale transaction. No wholesaler shall store any of his stock on the premises of any retail establishment.

"G. Persons engaged primarily in the sale, handling, distribution, and storage of alcoholic beverages which are ultimately delivered or transported beyond the borders of the state are exempt from complying with the standards above set forth.

"H. The board may adopt and publish rules and regulations for the enforcement of this section. Added Acts 1962, No. 463, § 6."

Appellants have attacked the constitutionality of Act 463 of 1962, particularly the foregoing Subsec-

[1] This paragraph and the following three paragraphs as they appear in LSA-R.S. Title 26:80 are identified as separate subsections E, F, G, and H respectively. The official publication of the act over the certificate of the Secretary of State and the photostatic copy of the original filed in evidence do not identify these paragraphs as separate subsections by letter or otherwise. They are all a part of Subsection D.

tion D, and seek injunctive relief against the enforcement of the provisions thereof enjoining the defendant from refusing to issue to them wholesale liquor permits on account of alleged failure to meet the so-called standards enumerated in said Subsection D. From a judgment against them dismissing their suits at their costs, they have appealed.

Act 463 of 1962, amending several sections of LSA-R.S. Title 26, covers a number of subjects in addition to that in Section 80, Subsection D. Appellants question the constitutionality of the act on this account contending that it is in contravention of LSA Constitution, Article III, Section 16, restricting legislation to embrace but one object. This attack is without merit and appellants have not pursued it in briefs and argument. Furthermore a discussion of this point is not necessary to a decision of the more serious questions before us. Neither do we find it necessary to discuss the question of constitutionality of Section 9 of the act amending LSA-R.S. 26:106, which limits the injunctive jurisdiction to cases in which certain administrative remedies have first been exhausted. Accordingly we have confined our opinion to the question of constitutionality of Section 6 of the act and more particularly Subsection D thereof, cited as LSA-R.S. 26:80, Subsection D.

Unless appellants have been denied some constitutional right by the application of the law to them, they have no right or cause of action for complaint, and it would be unnecessary to consider whether or

not the act is within the reasonable exercise of the police power of the state.

That they do have a constitutional right to engage in the wholesale liquor business on an equal and nondiscriminatory basis with other persons has been clearly settled by our Supreme Court in Schwegmann Bros. v. Louisiana Board, etc., 216 La. 148, 43 So.2d 248, 14 A.L.R.2d 680 (1949), and any denial or limitation of that right is an unconstitutional invasion of such right unless it can be justified as a reasonable exercise of the police power of the state.

In Schwegmann Bros. v. Louisiana Board, etc., supra, the Board of Alcoholic Beverage Control vigorously argued that the plaintiff had no inherent right to engage in the liquor business and had no right to attack the statute as unconstitutional. It contended, as in the instant case, that the statute grants a privilege, subject to such limitations as the state may see fit to impose from time to time. In answer to this argument the Supreme Court said in that case at pp. 252-253 of 43 So.2d:

> "* * *They argue: 'Matters which are considered as rights when applied to other circumstances under different conditions, cease to be rights and become mere conditions of the privilege when applied to the liquor traffic, because, first, no one has an inherent right to engage in the liquor traffic, and second, he is free to accept or renounce the conditions by accepting or refusing the license. Having voluntarily accepted

the license, he is no longer free to renounce the conditions.'

"Further, they say:

" 'Going one step further, not only has no man an inherent right to sell intoxicating liquors, but he has neither property rights, contract rights, nor vested rights in his license, once obtained.

" 'Actually, the only right a citizen has with reference to the sale by him of intoxicating liquors is his right to comply with the statute and to enforce compliance with the statute as against arbitrary administration of the statute by administrative bodies. In other words his sole right is the right to demand and retain such rights as are granted in the statute, upon a showing of non-compliance, or arbitrary abuse, on the part of the administering authority.'

"And in support of the arguments they cite and quote from numerous decisions (of this court and courts of other jurisdictions) including Crowley v. Christensen, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620; City of New Orleans v. Smythe, 116 La. 685, 41 So. 33, 6 L.R.A.,N.S., 722, 114 Am.St.Rep. 566; State ex rel. Orleans Athletic Club v. Louisiana State Boxing Commission, supra, [163 La. 418, 112 So. 31], and State v. Morton, 182 La. 887, 162 So. 718. These cases are authority for the universally accepted propositions that there is no inherent right in a citizen to sell intoxicating liquor; that under the police power of the state the liquor business may be entirely

prohibited, or it may be regulated within the discretion of the governing authority under such conditions as will limit to the utmost the evils associated therewith; and that liquor licenses are neither contracts nor rights of property. But we do not understand them to hold, as appellants insist they do, that the granting of a privilege to engage in the liquor traffic can be made to depend on conditions which violate any and all constitutional guaranties. If such were the law there could never be an unconstitutional statute dealing with the liquor traffic. Certainly that was not the holding in Crowley v. Christensen, supra [137 U.S. 86, 11 S.Ct. 16 [sic]], on which appellants principally rely, * * *

"Our appreciation of the law is that even though a state has the authority to grant or deny a privilege subject to conditions, which a person is free to accept or reject, its power in that respect is not unlimited. It may not through an abuse of its police power impose conditions which require the relinquishment of constitutional rights. And this limitation applies to the liquor traffic, notwithstanding that the state has the right to suppress it entirely or may, in curbing the attendant evils, impose regulations on it more stringent than on other businesses. When the liquor traffic is lawful, as it now is, all regulations provided therefor must be pursuant to a legitimate exercise of the state's police power, which includes the respecting of constitutional guaranties. Supporting this view is State ex rel.

Galle v. City of New Orleans, 113 La. 371, 36 So. 999, 1002, 67 L.R.A. 70, 2 Ann.Cas. 92, in which this court said:

"'It is wholly immaterial, for the purposes of the question presented, that it has been held that the right to sell intoxicating liquors is not inherent in a citizen of a state or of the United States (Crowley v. Christensen, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620), and equally immaterial that in another state it has been held that such right is derived from the common law (Welsh v. Indiana [126 Ind. 71], 25 N.E. 883, 9 L.R.A. [664], 666), since in Louisiana it is a right conferred by the written law of the state, the enjoyment of which is subject to such conditions only as may be imposed or authorized by the General Assembly in the legitimate exercise of the police power of the state.'"

Appellants have raised the issue of unfair discrimination and point to the above-quoted part of the act which excepts from its provisions a class of liquor wholesalers, commonly referred to as "border houses," meaning those persons engaged in wholesale distribution of liquor for transportation out of the state. The term "border houses" comes from the fact that most of these dealers are located near the state line for sale of liquor for transport into the State of Mississippi. Furthermore they contend that the act was conceived and enacted for the exclusive purpose of making their continued wholesale operations legally impossible. However obvious the mo-

tive of those who proposed and sponsored the passage of the act, it is not for us to question the motive of the Legislature in enacting it. State v. Goldfinch, 241 La. 958, 132 So.2d 860) (1961); Fireside Mut. Life Ins. Co. v. Martin, 223 La. 583, 66 So.2d 511 (1953); State ex rel. Porterie v. Smith, 184 La. 263, 166 So. 72 (1935).

We can find no basis for holding the act or the section complained of (LSA-R.S. 26:80, Subsection D) unconstitutional upon the ground of discrimination since it applies equally to all persons who come within a common class. The exception of the so-called "border houses" is an exception of a class or particular kind of wholesaler, not common to the class of wholesalers to which appellants belong. Laws must not be oppressive or discriminate arbitrarily between persons of the same class. Morey v. Doud, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957); Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948); Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 770 (1928). We repeat, the motive behind the legislation cannot be questioned if it is otherwise a valid exercise of legislative will and applies to all persons of the same class equally. On its face the law in question does that.

Having found under the authority of the Schwegmann case that appellants do have a right and cause of action in the instant case, we must now apply the standard test so well laid out in that case to deter-

mine if the act in question is a reasonable exercise of the police power of the state.

Unquestionably the subject of the act having to do with regulation and control of the liquor traffic is a proper one for legislative concern, and we can find no fault with the following portions thereof which appear to have a direct relationship to the object of the act and to be in the public interest:

1. Section 1, amending LSA-R.S. 26:2(9) defining liquor wholesalers and requiring them to meet certain "standards" set forth in the law. (Assuming the standards required are reasonable.)

2. Section 2, amending LSA-R.S. 26:74 requiring dealers to have permits.

3. Section 3, amending LSA-R.S. 26:75 requiring permits to be posted in a conspicuous place.

4. Section 4, amending LSA-R.S. 26:78 regarding applications and probationary periods of operation.

5. Section 5, amending Subsection A of LSA-R.S. 26:79 relative to disqualification of spouse of permittee whose permit has been denied or revoked.

6. Section 6, insofar as it amends Subsection B of LSA-R.S. 26:80 regulating locations of retail liquor sales.

7. Section 7, amending LSA-R.S. 26:81 relative to persons interposed for owner of a liquor business.

8. Section 8, amending LSA-R.S. 26:88 relative to solicitation for prostitution on licensed premises and prohibiting sale, possession or consumption of narcotics on licensed premises.

9. Section 9, amending LSA-R.S. 26:106 relating to injunctive remedies.

10. Section 10, amending LSA-R.S. 26:163 requiring permits as condition precedent for purchase of liquor by retailers.

Sandwiched in between these very proper and valid regulatory measures in Section 6 is the amendment adding to LSA-R.S. 26:80 a new subsection which is given the letter D. This is the subsection which purports to set the "standards" mentioned in the foregoing Section 1 of the act. It is this Subsection D which presents the only serious question in this case. We must now determine if it comes within the limits of reasonable exercise of the police power of the state. In seeking an answer to the question, we turn again to the opinion of the Supreme Court in Schwegmann Bros. v. Louisiana Board, etc., supra, and quote from pp. 257-258 of 43 So.2d:

"Returning to the position of appellants [appellees here] herein, it is indisputable that the liquor traffic can be regulated, even prohibited,

by the valid exercise of the police power, the regulating thereof being essential to the general health, peace, good order, and morals of the people. Further, it must be observed that the announced object or purpose of Act 360 of 1948 [The same act in question here as amended and which is now LSA-R.S. Title 26.], is to regulate and control, under the police power, all traffic of alcoholic beverages containing more than six per centum of alcohol by volume. This is clearly stated in a preamble, immediately preceding the enacting clause, reading: 'Whereas, it is deemed necessary for the protection of the safety, welfare, health, peace and morals of the people of the State that all traffic in alcoholic beverages containing more than six per centum of alcohol by volume be regulated and controlled, and that the police power of the State be exerted so that the said traffic may not cause injury to the economic, social and moral well-being of the people of the State, now therefore.'

"Now, in applying the above test, the following questions must be answered: Is there a real and substantial relation between the mandatory minimum mark ups [in this case standards for liquor wholesaler] of the statute and the preventing of injury to the economic, social and moral well being of the people of the state? Are those means (the mark ups) [standards set out in Subsection D] reasonably necessary and appropriate for the accomplishment of the legitimate object or

purpose which the statute announces (regulation and control of the traffic)?"

Appellee has argued that the right to engage in the wholesale liquor business in the State of Louisiana is not an inherent right, but rather a privilege conferred by the state. From this premise it is contended that the state, having the right to prohibit, has the right to control. In other words, the greater (authority) includes the lesser. This is a thoroughly sound principle, but the unlimited application of it, which appellee now contends for, has already been rejected by our Supreme Court. Appellee contends in its brief:

> "This Court need read but one case decided by the United States Supreme Court and dismiss the argument advanced by appellants that state legislation affecting the liquor traffic within its bounds is subject to the ordinary federal constitutional provisions. Again, the land mark case so forgotten in appellants' brief is called to the Court's attention. Crowley v. Christensen, supra [137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620]. This often cited case held that the federal constitutional guaranties against abridging the privileges and immunities of citizenship, equal protection of the law, due process of law, and impairing the obligations of contract, do not apply to state regulation of liquor traffic similar to their application to other fields of business endeavor. See also Bartemeyer v. Iowa, supra [18 Wall. 129 (85

U.S.) 21 L.Ed. 929]; Manchester Press Club v. State Liquor Com., supra [89 N.H. 442, 200 A 407, 116 ALR 1093]."

This argument was supported by Justice McCaleb in his dissenting opinion in the Schwegmann case but rejected by the majority opinion.[2]

This contention was also made an issue in Hornsby v. Allen, 326 F.2d 605 (5th Cir. Ga. 1964), and the United States Fifth Circuit Court of Appeals had this to say:

"* * * Merely calling a liquor license a privilege does not free the municipal authorities [or state] from the due process requirements in licensing and allow them to exercise an uncontrolled discretion. * * *"

The Court further held in that case that the states do not escape the operation of the Fourteenth Amendment of the Constitution of the United States in dealing with intoxicating beverages by reason of the Twenty-first Amendment, Section 2. Citing other authorities it held that the Twenty-first Amendment, Section 2, did not clothe the states with any greater

[2] Crowley v. Christensen, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620 (1890); State v. Morton, 182 La. 887, 162 So. 718 (1935); City of New Orleans v. Smythe, 116 La. 685, 41 So. 33, 6 L.R.A.,N.S., 722 (1906); 11 American Jurisprudence, verbo, "Constitutional Law"; 30 American Jurisprudence, verbo, "Intoxicating Liquors"; and Ziffrin, Inc. v. Reeves, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939), relied upon by appellee here, were cited or discussed by the Supreme Court in Schwegmann Bros. v. Louisiana Board, etc., 216 La. 148, 43 So.2d 248, 14 A.L.R.2d 680 (1949).

right in the control of the sale of liquor than it had over other commodities.

We thoroughly subscribe to the belief that there are many social evils inherent in the liquor traffic, and we do not necessarily agree that the regulation of its sale should be put on the same basis with all other commodities. But since it is a lawful business, we hold that the state's power of control must be exercised within the limits of constitutional guaranties to all persons to engage in such business without unreasonable discrimination. By this we do not mean that discrimination is not in some cases justifiable. The right of the individual to engage in a lawful business must yield to the greater right of the public to be protected in its moral, social, and economic welfare. But there must be a real and substantial relationship between the regulations imposed and the prevention of injury to the moral, social, or economic welfare of the public. We fail to find such relationship in the instant case. For a more thorough discussion of this subject, see Louisiana Wholesale Distributors Ass'n v. Rosenzweig, 214 La. 1, 36 So.2d 403 (1948), and cases there cited.

Appellee relies heavily on Duke Molner Wholesale Liquor Co. v. Martin, 180 Cal.App.2d 873, 4 Cal.Rptr. 904 (1960). Writs were denied by the United States Supreme Court, 364 U.S. 870, 81 S.Ct. 112, 5 L.Ed. 2d 92. That is a case involving the constitutionality of Rule 28 of the Department of Alcoholic Beverage Control promulgated pursuant to the laws of Cali-

fornia. The rule complained of in California set out certain alleged standards for liquor wholesalers which, except for the "border house" exception, is very similar to LSA-R.S. Title 26:80, Subsection D. In fact the record discloses that consideration was given to the adoption of a similar rule by the Louisiana Board of Alcoholic Beverage Control but that upon legal advice an act of the Legislature was recommended as more likely to stand the test of constitutionality.

We are not bound by the decision in the California case and do not intend to follow it. However, we think it is pertinent to point out that that case reveals the need in California of regulations to combat the potential danger from economically unsound wholesale liquor dealings by financially irresponsible persons. There the main contention of the plaintiffs (four wholesale liquor dealers) was that they did not have sufficient capital to maintain the stock required. Their operations consisted largely of "consignment" orders and the handling of liquor "presold" which did not require as much investment or financial responsibility as wholesalers generally. This was the main emphasis in their case and no evidence was introduced on any other point. The Court held: "The Department is well within its rights to require a high standard of economic stability for those who are to hold wholesale licenses." Citing Schaub's, Inc. v. Department of Alcoholic Bev. Con., 153 Cal.App.2d 858, 315 P.2d 459.

We can agree that economic stability and financial responsibility of liquor dealers, both wholesale and retail, are desirable. It is conceivable that such persons in financial difficulty might resort to practices, or fall into the hands of unscrupulous money lenders or racketeers, to the detriment of the public interest.

Legislation reasonably designed to accomplish the legitimate purpose of financial responsibility might very well be a lawful exercise of the state's police power; but we fail to see how the number of square feet of storage space for the wholesaler's liquor stock is a legitimate criterion for determining financial responsibility, nor does it relate to other aspects of public health, safety, morals, or general welfare.

We see no relationship between the requirement that the wholesaler own or operate delivery trucks and the object of the law, nor do we see where any public benefit is derived from requiring that brand representation be maintained with distilleries.

The number of customers and extent of the wholesaler's trade area, the percentage of sales to any given number of customers, and his inventory in volume and cost have no direct or substantial relationship to the protection of the morals, health, safety, economic, or general welfare of the public.

The definition of wholesaler which this subsection apparently attempts, embraces elements generally associated with wholesalers as distinguished from retailers of commodities, but we fail to see the neces-

sity for this nor how it relates to the declared object of the law, "the protection of the safety, welfare, health, peace and morals of the people of the State." The mere fact that it relates to liquor wholesalers rather than to wholesalers in general does not in our opinion meet the requirement that it be reasonably necessary and appropriate for the accomplishment of a legitimate object within the state's police power. The mere assertion that an act has such relationship does not of itself bring it within the limits of proper exercise of that power. State v. Blake, 170 La. 175, 127 So. 592 (1930) cited with approval in the Schwegmann case.

If the objective of LSA-R.S. 26:80, Subsection D is to insure economically stable and financially responsible wholesale liquor dealers, it could have been accomplished by more direct and appropriate means within constitutional limits.

We fail to find in the so-called standards set forth in Subsection D any legitimate relationship to the declared purpose of the Alcoholic Beverage Control Law (LSA-R.S. Title 26). We do not feel that the object of the law would be accomplished or that the interest of the public would be served in any way by it. In the absence of some protection of the moral, social, or economic welfare of the public to justify Subsection D, it must be held in violation of the "due process of law" provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States and Article I, Section 2 of the Constitution of Louisiana.

Act 463 of 1962 does not contain a severability clause, however, it amends LSA-R.S. Title 26, the source authority of which is Act 360 of 1948 which does contain a severability clause providing:

> "Section 85. If any section, sub-section, paragraph, sentence, clause or other part of this Act, for any reason, be declared unconstitutional, invalid, or not legally enforcible, no other part of application of this Act shall be affected thereby."

We specifically limit this opinion and decree to said Subsection D which is clearly separable.

With full cognizance of the rule of statutory construction which requires us to declare a statute constitutional unless its unconstitutionality is manifest,[3] we hold that Subsection D of Section 80 of Title 26 of Louisiana Revised Statutes, as enacted by Section 6 of Act 463 of 1962, is unconstitutional, null and void.

Accordingly the judgments appealed from are reversed.

In the case bearing docket number 1717, entitled Lawrence J. Reynolds, d/b/a Larry and Katz v. Louisiana Board of Alcoholic Beverage Control, it is now ordered, adjudged and decreed that there be judgment in favor of said plaintiff against defendant permanently enjoining and prohibiting said de-

[3] Woodard v. Reily, 244 La. 337, 152 So. 2d 41 (1963); Police Jury of Parish of St. Charles v. St. Charles Par. Waterworks Dist. No. 2, 243 La. 764, 146 So. 2d 800 (1962); State v. Gatlin, 241 La. 321, 129 So.2d 4 (1961).

fendant, its officers, agents, and employees from enforcing the provisions of LSA-R.S. Title 26, Section 80, Subsection D, and from withholding from said plaintiff a wholesale liquor permit on account of any provision of said Subsection D.

In the case bearing docket number 1718, entitled John Schwegmann, Jr., and Paul Schwegmann v. Louisiana Board of Alcoholic Beverage Control, it is now ordered, adjudged and decreed that there be judgment in favor of said plaintiffs against defendant permanently enjoining and prohibiting said defendant, its officers, agents, and employees from enforcing the provisions of LSA-R.S. Title 26, Section 80, Subsection D, and from withholding from said plaintiffs a wholesale liquor permit on account of any provision of said Subsection D.

The defendant, Louisiana Board of Alcoholic Beverage Control, is cast for all cost of this proceeding except such as may be exempt by law, if any.

Reversed and judgments rendered.

## APPENDIX D.

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, DIVISION "E".**

**DOCKET 5.**

**No. 406-928 (Consolidated for Trial with No. 406-929).**

**LAWRENCE J. REYNOLDS, d/b/a LARRY & KATZ, ET AL.,**

**vs.**

**LOUISIANA BOARD OF ALCOHOLIC BEVERAGE CONTROL.**

**JUDGMENT.**

The Court, having referred the exception of no cause of action filed by defendant herein to the merits of the case, and the case having been tried and submitted for adjudication on all the issues before the Court, and considering the law and the evidence to be in favor of the defendant for the reasons contained in the written opinion of this Court on file herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendant, Louisiana Board of Alcoholic Beverage Control, and against the plaintiff, Lawrence J. Reynolds d/b/a Larry & Katz, et al, dismissing this suit at plaintiff's cost.

JUDGMENT READ, RENDERED AND SIGNED in open Court this 13th day of March, 1964 at New Orleans, Louisiana.

(S.) HOWARD J. TAYLOR,
Judge.

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, DIVISION "C".**

**DOCKET 5.**

**No. 406-929 (Consolidated for Trial with No. 406-928).**

**JOHN SCHWEGMANN, JR., AND PAUL SCHWEGMANN,**

**vs.**

**LOUISIANA BOARD OF ALCOHOLIC BEVERAGE CONTROL.**

**JUDGMENT.**

The Court, having referred the exception of no cause of action filed by defendant herein to the merits of the case, and the case having been tried and submitted for adjudication on all the issues before the Court, and considering the law and the evidence to be in favor of the defendant for the reasons contained in the written opinion of this Court on file herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendant, Louisiana Board of Alcoholic Beverage Control, and against the plaintiffs, John Schwegmann, Jr., and Paul Schwegmann, dismissing this suit at plaintiffs' cost.

JUDGMENT READ, RENDERED AND SIGNED in open Court this 13th day of March, 1964 at New Orleans, Louisiana.

(S.) HOWARD J. TAYLOR,
Judge.

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, DIVISION "E". DOCKET 5.**

**No. 406-928.**

**LAWRENCE J. REYNOLDS d/b/a LARRY & KATZ,**

**vs.**

**LOUISIANA BOARD OF ALCOHOLIC BEVERAGE CONTROL,**

**Consolidated with 406-929.**

**JOHN SCHWEGMANN, JR. AND PAUL SCHWEGMANN,**

**vs.**

**LOUISIANA BOARD OF ALCOHOLIC BEVERAGE CONTROL.**

**REASONS FOR JUDGMENT.**

In these consolidated cases, plaintiffs seek a declaration of the unconstitutionality of Act No. 463 of the 1962 Regular Session, and particularly Section 80 thereof.

It is unquestionable that control of intoxicating liquors is a proper sphere for the operation of the police power of the state. A state's power absolutely to prohibit the manufacture, sale, transportation or

possession of intoxicants includes the lesser power to permit these things only under definitely prescribed conditions. *Ziffrin v. Reeves,* 308 U.S. 132. "There can be no doubt that the prohibition of regulation of the sale or distribution of intoxicating liquors falls within the domain of the police power." *State v. Martin,* 162 So. 718.

Where, however, the state legalizes the business of selling liquors, regulations must have a just foundation in reason. *State ex rel Galle v. New Orleans,* 113 La. 371. ". . . And this limitation applies to the liquor traffic, notwithstanding that the state has the right to suppress it entirely or may, in curbing the attendant evils, impose regulations on it more stringent than on other business. When the liquor traffic is lawful, as it now is, all regulations provided therefor must be pursuant to a legitimate exercise of the state's police power, which includes the respecting of constitutional guaranties." *Schwegmann Brothers v. Louisiana Board of Alcoholic Beverage Control,* 216 La. 148, 43 So. 2d 248.

Section 80 of the act provides extensive regulations pertaining to liquor wholesalers and wholesale transactions; the statute itself forms a part of the state legislation enacted to control commerce in liquor and its attendant evils.

If legislative regulations are found to be a legitimate exercise of the state's police power, it is not

for the court to pass on the wisdom of the legislative action. Nor can the court search for legislative motive in considering the consitutionality of a statute. *State v. Goldfinch,* 132 So. 2d 860.

This court finds that the statute is neither unreasonable nor unduly discriminatory in the consitutional sense. Except for a provision exempting those engaged primarily in the traffic of liquor ultimately distined for out of state delivery, the statute applies to all wholesalers in the state. Obviously, the state does not have the same interest to protect in these last mentioned transactions as it does in the case of liquor to be consumed within its borders.

See *Duke Molner Wholesale Liquor Co. v. Martin,* 4 Cal Rptr. 904, in which the constitutionality of a virtually identical statute, except for the exemption feature, was upheld; and writs were denied by the Supreme Court of the United States.

Accordingly, there will be judgment in favor of the defendant, dismissing plaintiffs' suits.

New Orleans, Louisiana, March 13th, 1964.

(S.) HOWARD J. TAYLOR,
Judge.

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# Supreme Court of the United States

OCTOBER TERM, 1965

No. 229

LAWRENCE J. REYNOLDS, d/b/a LARRY & KATZ, and JOHN SCHWEGMANN, JR., and PAUL SCHWEGMANN

Appellants,

versus

LOUISIANA BOARD OF ALCOHOLIC BEVERAGE CONTROL

Appellee.

## ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

## MOTION TO DISMISS

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# Supreme Court of the United States

OCTOBER TERM, 1965

No. 1411

LAWRENCE J. REYNOLDS, d/b/a LARRY & KATZ, and JOHN SCHWEGMANN, JR., and PAUL SCHWEGMANN

Appellants,

versus

LOUISIANA BOARD OF ALCOHOLIC BEVERAGE CONTROL

Appellee.

**ON APPEAL FROM THE SUPREME COURT OF LOUISIANA**

## MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss this case on the ground that the federal question presented is so unsubstantial as not to warrant further argument.

## STATEMENT

The Louisiana Legislature, during its regular session held in 1962, enacted into law a statute regulating the sale of intoxicating beverages in wholesale quantities. Act. No. 463 of the Regular Session of the 1962 Legis-

lature of Louisiana. (Now designated as Louisiana Revised Statutes, Title 26, Section 80, Subsections D through H.) Pursuant to this Act, the Louisiana Board of Alcoholic Beverage Control, Appellee herein, refused to issue 1963 wholesale liquor permits to Appellants herein. It is admitted that neither Appellant is qualified to receive such a permit under the terms of the 1962 Act. Both Appellants filed suit on December 3, 1962, in the Civil District Court for the Parish of Orleans, State of Louisiana, seeking to have the subject statute declared repugnant to the Constitutions of both the State of Louisiana and the United States of America. Because of their similarity, these two suits were consolidated for trial and all of the evidence entered into the record was by way of joint stipulation between counsel for the litigants.

The State District Court, on March 13, 1964, rendered its decision dismissing the suits of both appellants. From those judgments, Appellants appealed to the Fourth Circuit Court of Appeal for the State of Louisiana. On March 8, 1965, that Court reversed the decision of the District Court and held that the subject statute did violate both the Louisiana and United States Constitutions. However, on June 7, 1965, the Supreme Court of Louisiana granted a Writ of Certiorari to review the decision of the State Appellate Court. After a full presentation of the case was made by brief and oral argument by counsel for both Appellants and Appellee, the State Supreme Court, on December 13, 1965, reversed the decision of the State Appellate Court and reinstated the decision of the State District Court sustaining the constitutionality of the subject act. In a thorough and well written opinion, the Court found that the Act in

question was a valid exercise of the police power of the State in regulating the flow of liquor in wholesale quantities within its bounds. It is from this decision that the Appellants have appealed.

## ARGUMENT

The instant statute was enacted pursuant to the police power of a state to control the flow of liquor in wholesale quantities within its bounds. The Louisiana Legislature sought to establish a class of true wholesalers within the state liquor business. Section D of this statute, in effect, legislatively defines the functions of a wholesaler and limits wholesale liquor permits to those parties who discharge those functions. As the State Supreme Court noted in its opinion:

> "It requires that wholesalers maintain warehouse space. It requires that such space be sufficient to store specified quantities of liquor. It requires that a certain stock of liquor be maintained. It requires that delivery equipment be maintained. It requires that brand representation be maintained with at least one distillery . . . Finally, it requires that a certain amount of the wholesaler's sales be made to retailers, and that such sales account for a certain percentage of the gallonage handled by the wholesaler . . . "
> *Reynolds v. Louisiana Board of Alcoholic Bev. Con.*, 248 La. 639, 181 So. 2d 377 at pages 381, 382.

In the Jurisdictional Statement filed by Appellants in this Court, three attacks are leveled at the constitutionality of the subject statute. The first attack concerns itself with that provision of the statute which

limits a wholesale liquor license to one who "maintains sales of liquor to retailers generally within his immediate trade area, making sales to at least twenty per cent of the retailers in that area." Appellants contend that this provision will foreclose the issuance of any further wholesale liquor licenses as no new applicant for a license can be selling to twenty per cent of the available retailers at the time he applies for a license. However, this interpretation is obviously strained and patently erroneous. This provision establishes a condition subsequent to the issuance of a license, i.e. unless a permittee maintains this required percentage of retail sales, his license will not be reissued. No other construction of this provision is feasible. The best evidence in support of this construction is the record which reflects that in the period of less than six months between the effective date of this statute and the time when the stipulations were formulated in the instant case, a new business, having satisfied all of the provisions of the subject statute, was given a wholesale liquor license.

The second attack set forth in the Jurisdictional Statement challenges the authority of the State Legislature to define what it believes to be the desirable qualities which a liquor wholesaler should possess, and to limit wholesale liquor licenses to only those parties who possess these qualities. The standards set forth in the statute are certainly reasonable, and the State, under Section Two of the Twenty-First Amendment to the United States Constitution, and pursuant to its police power, may insist that any applicant for a wholesale liquor license satisfy these standards. The state has the right, even a duty, to police the flow of alcoholic beverages within its bounds. *Joseph E. Seagram & Sons, Inc.*

*v. Hostetter*, 16 L. ed. 2d 336, 86 S. Ct. 1254. In upholding the constitutionality of this Act, the Louisiana State Supreme Court held:

> "It is hardly necessary to state that an economically stable and financially responsible wholesale liquor business (as stated supra in the Board's explanation of the purpose of the instant statute) affects the social, moral, and economic welfare of the public. The provisions of the instant statute if enforced will undoubtedly engender stability and responsibility. Therefore, a definite relationship exists between LSA-R.S. 26:80 (D) and the purpose for which it was enacted." *Reynolds v. Louisiana Board of Alcoholic Bev. Con.*, supra at page 382.

The third and last attack upon the constitutionality of the instant statute set forth in the Jurisdictional Statement concerns itself with a charge of discrimination. The provisions of Section D of the subject statute do not apply to those wholesalers who primarily export alcoholic beverages into other states. However, it is submitted, this exclusion is reasonable as the state has no real interest in export sales as the traffic of liquor is flowing out of the State of Louisiana into another state; consequently, the Louisiana retailer and consumer are not affected. Moreover, as the Louisiana courts have noted in this case, this is an exception of a class or particular kind of wholesaler, not common to the class of wholesalers to which Appellants belong.

It should be noted that the Department of Alcoholic Beverage Control for the State of California enacted into law an administrative rule which is almost identical with the subject statute. (This rule did not con-

tain the exclusionary provision relating to wholesalers who sold liquor primarily for export from the state.) The constitutionality of this rule was also attacked. The California Appellate Court which heard the case recognized that the State Department of Alcoholic Beverage Control was well within its rights to require a high standard of economic stability for those who are to hold wholesale liquor licenses, and held the rule to be constitutional. This Court denied an application for a Writ of Certiorari filed with respect to that case. *Duke Molner Wholesale Liquor Co. v. Martin*, 4 Cal. Reptr. 904, Certiorari den., 364 U. S. 870, 5 L. ed. 2d 92, 81 S. C. 112.

## CONCLUSION

It is respectfully submitted that the subject statute is reasonable and was enacted by the State Legislature pursuant to its police power and under the authority of Section Two of the Twenty-First Amendment to the Constitution of the United States. The appellants have presented no substantial federal question for the decision of this Court, and accordingly, this Motion to Dismiss should be granted.

Respectfully submitted,

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By: Peter J. Butler
Peter J. Butler

July 8th, 1966

## PROOF OF SERVICE

I, Peter J. Butler, counsel of record for the Louisiana Board of Alcoholic Beverage Control, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that a copy of the foregoing Motion to Dismiss was transmitted to Saul Stone of Stone, Pigman and Benjamin, counsel of record for Lawrence J. Reynolds, d/b/a Larry & Katz and John Schwegmann, Jr., and Paul Schwegmann, Appellants herein, by depositing it in the United States mail, first class postage prepaid, addressed to him at his office in the Whitney Bank Building, New Orleans, Louisiana, this 8th day of July, 1966.

New Orleans, Louisiana, this 8th day of July, 1966.

Peter J. Butler

Peter J. Butler